ISAH EKRAM & ORS A

v.

HADIZAH RAMLI

HIGH COURT SABAH & SARAWAK, KUCHING B
YEW JEN KIE J
[ORIGINATING SUMMONS NO: KCH-24-29-3-2013]
10 FEBRUARY 2014

LAND LAW: *Indefeasibility of title and interests - Adverse possession - Whether defendant trespassers and unlawful occupiers of land - Whether regarded as tenant or leaseholders - Whether action should be commenced by writ - Whether summary proceedings under O. 89 Rules of Court 2012 improper and procedurally wrong - Continuous occupation of land for a long duration - Whether defendant could claim for adverse possession - Whether triable issues arose* C D

CIVIL PROCEDURE: *Summary possession of land - Application for - Whether action should be commenced by writ - Whether triable issues arose - Whether application improper and procedurally wrong - Whether claim for adverse possession allowed - Whether preliminary objection dismissed - Rules of Court 2012, O. 89* E

The plaintiffs were the registered proprietresses of a land located in Serian, Sarawak ('the land'). The land was part of a bigger lot namely Lot 44 Block 20 Sedilu Gedang District, which was compulsorily acquired by the State Government. The residue of lots were given new titles. The plaintiffs' late father was the registered owner of the land since 31 January 1941 *vide* certified document of title issued on 18 November 1974. The defendant and her family had been occupying the land for a number of years. Hence, the present application to recover possession of the land. The defendant raised a preliminary objection to the plaintiffs' application for summary proceedings for possession of land under O. 89 of the Rules of Court 2012 ('ROC') and contended that the application was improper and procedurally wrong. The defendants contended that the plaintiffs could not use O. 89 of the ROC to claim possession from occupiers who were tenants, leaseholders or who hold over the land under licence but should have commenced the action by way of writ. The defendant raised several triable issues and averred that the late father of the plaintiff had acquired the title of the land through fraudulent transfer. Secondly, the defendant argued that she had inherited and acquired her rights over the land and the building thereon from her late grandfather. However, the defendant had not adduced any cogent evidence to show that their entry onto the land was with the consent, permission or agreement of the plaintiffs or their late F G H I

father. The defendant further contended that the plaintiffs failed to comply with O. 89 r. 3(b) of the ('ROC') by their failure to fully disclose the whole of the relevant circumstances as to how the land was occupied by the defendant prior to and after the compulsory acquisition by the State Government. The issues for determination, *inter alia*, were (i) whether the plaintiffs' application for summary proceedings for possession of land under O. 89 of the ROC was improper and procedurally wrong; and (ii) whether the defendant could claim for adverse possession against the plaintiffs since the defendant had occupied the land for a long time.

Held (allowing plaintiffs' application with costs):

(1) There was no merit in the preliminary objection. The plaintiffs' application was premised on the allegation that the defendant and all other occupants were trespassers and unlawful occupiers of the land and that the plaintiffs and their late father who, at all material times, were the registered proprietor of the land never permitted or gave any licence to the defendant or other occupants to stay on their land. There was nothing procedurally wrong for the plaintiff to claim possession of the land by summary procedure provided under O. 89 of the ROC. It was for the defendant to satisfy the court that the summary proceeding under O. 89 was not suitable by reason that there was triable issue of law and fact and the defendant, therefore, was entitled to a trial. As such, the preliminary objection was dismissed. (paras 12, 16, 18 & 19)

(2) The defendant did not adduce any cogent evidence in the affidavit to substantiate the allegation of fraud. Hence, the bare assertion of fraudulent transfer carried no probative value and was disregarded. (para 30)

(3) The Sarawak Land Code (Cap 27) in giving effect to the indefeasible title did not recognise squatters. Regardless of how long the defendant and her family had stayed on the land, it made no difference as they could not claim adverse possession against the plaintiffs who were the registered proprietresses of the land. Therefore, the defendant had not shown that there was a triable issue of law or fact that warranted the dismissal of the plaintiffs' application. (paras 40 & 41)

Case(s) referred to:

Bohari Taib & Ors v. Pengarah Tanah & Galian Selangor [1991] 1 CLJ 647; [1991] 1 CLJ (Rep) 48 SC ***(refd)***

Chiu Wing Wa & Ors v. Ong Beng Cheng [1994] 1 CLJ 313 SC ***(refd)***

Immetec Sendirian Berhad v. Yong Tai Hoong & Anor [1994] 1 LNS 60 HC ***(refd)***

Jamir Hassan Najir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC ***(refd)***

Lee Beng Lai & Ors v. Tetuan Tokoyaki Property Sdn Bhd [2002] 3 CLJ 365 CA ***(refd)***
Titular Roman Catholic Bishop of Penang v. Stephen Ramachandran [1994] 1 LNS 202 HC ***(refd)***
Yayasan Pelajaran Bahagian Pertama Sarawak v. Lim Teck Hai and Ors [2008] 1 LNS 637 HC ***(refd)***

Legislation referred to:
Limitation Ordinance (Cap. 49), s. 26
National Land Code, s. 341
Rules of Court 2012 O. 14, O. 89 r. 3(6)
Rules of the High Court 1980, O. 18 r. 19, O. 89
Sarawak Land Code (Cap 27), s. 30(1)
Sarawak Land Code (Cap 81), s. 131

For the plaintiff - Abang Zain; M/s Hamzah & Ong Co. Advocs
For the defendant - Jonathan Jalin; M/s Jonathan Jalin & Co. Advocs

Reported by Sandra Gabriel

JUDGMENT

Yew Jen Kie J:

[1] *Vide* this originating summons, the plaintiffs applied for an order that they do recover possession of Lot 1508, Block 20 Sedilu Gedong Land District of Kampung Lalang Gedong *via* Serian, 94700 Serian, Sarawak ("the Land").

Background Facts

[2] The plaintiffs are the registered proprietresses of the land.

[3] The land was part of a bigger lot, namely, Lot 44 Block 20 Sedilu Gedong Land District, which was compulsorily acquired by the State Government. The residue of Lot 44 Block 20 Sedilu Gedong Land District was given new titles, namely, Lot 1506, 1507 and 1508 all of Block 20 Sedilu Gedong Land District of Kampung Lalang Gedong *via* Serian, 94700 Serian, Sarawak.

[4] The plaintiffs' late father, Haji Ekram Bin Mahmut, was the registered owner of the land since 31 January 1941 *vide* certified document of title of Lot 44 Block 20 Sedilu Gedong Land District issued on 18 November 1974 (exh. E-3 annexed to the plaintiffs' affidavit in reply).

[5] The defendant and her family have been occupying the land for a number of years.

[6] Hence, the present application.

A **Preliminary Objection**

[7] The defendant raised a preliminary objection to the plaintiffs' application for summary proceedings for possession of land under O. 89 Rules of Court 2012 and contended that the application herein is improper and procedurally wrong on the following grounds.

B

[8] Firstly, O. 89 Rules of Court 2012 cannot be used to claim possession from occupiers who are tenants, leaseholders or who hold over the land under licence. The land owner must commence his action by way of writ, citing *Bohari Taib & Ors v. Pengarah Tanah & Galian*
C *Selangor* [1991] 1 CLJ 647; [1991] 1 CLJ (Rep) 48; [1991] 1 MLJ 343 and *Titular Roman Catholic Bishop of Penang v. Stephen Ramachandran* [1994] 1 LNS 202; [1994] 3 MLJ 4.

[9] Counsel for the defendants contended that for the purpose of O. 89 Rules of Court 2012, a distinction should be made between squatters
D *simpliciter* who have no rights whatsoever and occupiers with licence or consent as well as tenant and licences holding over.

[10] Secondly, the defendant had inherited and acquired her rights over the land and the building thereon from her late grandfather Tamin Bin
E Jalai. The defendant and her family have been continuously occupying the land since 1950 and the land was then registered under Simunjan Occupation Ticket No. 4869. Thus, the defendant and her families are tenants or leaseholder and not squatters *simpliciter*.

F **[11]** Thirdly, the plaintiffs have failed to comply with r. 3(b) of O. 89 Rules of Court 2012 by their failure to fully disclose in their affidavit in support the whole of the relevant circumstances as to how the land came to be occupied by the defendant prior to and after the compulsory acquisition by the state government.

G **[12]** I see no merit in the preliminary objection for the following reasons.

[13] In *Bohari Taib & Ors*, *supra*, it was held that the appellants had sufficiently shown by affidavit evidence that they have arguable case in that they and some, if not all, of the other farmers have occupied the
H said land for three years under licence and thereafter have remained in occupation with the continued consent of the state government by virtue of the alienation already approved prior to the temporary occupation licence.

I **[14]** In *Titular Roman Catholic Bishop of Penang*, *supra*, it was held that this was not a proper case for summary proceedings for possession for land under O. 89 of the Rules of the High Court 1980 as there were disputes which could not be resolved by affidavit evidence alone.

[15] Neither cases cited by the defendants supports the defendants' preliminary objection that the plaintiffs' application under O. 89 Rules of Court 2012 is procedurally wrong. Order 89 states:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by Originating Summons in accordance with the provision of this Order.

[16] The plaintiffs' application under O. 89 Rules of Court 2012 is premised on the allegation that defendant and all other occupants at all material times are trespassers and unlawful occupiers of the land and that the plaintiffs and their late father who, at all material times, were the registered proprietor of the land never permitted and/or gave any licence to the defendant or other occupants to stay on their land.

[17] In *Chiu Wing Wa & Ors v. Ong Beng Cheng* [1994] 1 CLJ 313 SC, Mohamed Azmi SCJ enunciated the following principles pertaining to the then O. 89 of the Rules of the High Court 1980 (now O. 89 Rules of Court 2012):

(a) The summary procedure under O. 89 should not be allowed to apply where the entry to the land in the first instance is lawful, for in such a situation, there must necessarily be the facts and the law for determination by evidence *viva voce*;

(b) The summary procedure under O. 89 is governed by the same principles as those under O. 14;

(c) To entitle a defendant to a trial, all the defendant needs to do is to show that there is a triable issue of law or fact;

(d) It is only in clear cases of trespass that a summary order can be made under O. 89;

(e) An application under O. 89 should be dismissed if there are triable issues of fact and law, as such an application for vacant possession ought to have been commenced by writ; and

(f) For the purpose of the summary procedure under O. 89, a distinction should be made between squatters *simpliciter* who have no rights whatsoever and occupiers with licence or consent, as well as tenants and licences holding over: *Bohari*, SC, *supra*; *Immetec*, HC, *supra*.

[18] In my view, there is nothing procedurally wrong for the plaintiff to claim possession of the land by summary procedure provided under O. 89 Rules of Court 2012. On the strength of the high authorities

above, once such a summary procedure has commenced, as in this case, it is for the defendant to satisfy the court that the summary proceeding under O. 89 is not suitable by reason that there is triable issue of law and fact and the defendant, therefore, is entitled to a trial.

[19] Accordingly, I rule that the preliminary objection be dismissed.

Triable Issue

[20] The defendant averred that the defendant's grandfather, the late Haji Tamin Bin Haji Jalai had acquired ownership of the land from one late Saiee Bin Kontol on 15 September 1956 as evidenced by two agreements marked exh. HRB-1 and HRB-2, which was witnessed by Tua Kampung Wa Ghani. The defendant's families have settled on the land and continued occupation on the land until today.

[21] The defendant disputed the certified Document of Title of Lot 44 Block 20, Sedilu Land District issued on 18 November 1974 (exh. E-3) which is registered in the name of Ekram Bin Mahmut to replace Simunjan Occupation Ticket No. 4869. The defendant averred that the late father of the plaintiff had in 1974 acquired the title of the land through fraudulent transfer. It was contended that the state authority must prove and produce the original document of Simunjan Occupation Ticket No. 4869 in court.

[22] The defendant denied and claimed that she had not been notified as regard part of a bigger Lot 44 Block 20, Sedilu Gedong Land District being compulsory acquired by the State Government.

The Two Agreements [exh. HRB-1 and exh. HRB-2]

[23] The translation of exh. HRB-1 reads:

> Bahawa saya Jahri Bin Kontoi berjanji dengan adik saya Saie Bin Kontoi. Saya Telah menjual kebun saya di Lubok Lalang di Belakang rumah adik saya Saie Bin Kontoi dengan harganya $70 dan saya terima wang dari adik saya Saie di hadapan bini saya nama Ayun Bt Aren dihadapan tua kampong serta saya menerima $70.
>
> Tanda tangan Jahri Menjual Kebun
>
> Tanda tangan Ayum Bt Aten
>
> Tanda tangan Saie

[24] The translation of exh. HRB-2 reads:

> Saie Bin Kontoi telah memberitahu kepada saya, dia telah menjual kebunnya kepada Tamin Bin Jalai dengan harga empat ratus ringgit $400/-.

Kebunnya itu di Lubok Lalang Kampung Gedong dan wang harganya sudah diterima oleh Saie

T. tangan Tua Kampung

T. Tangan Saksi Wa Ghani Binti Ojet

15.9.1956

[25] It can be seen from exh. HRB-1 and HRB-2 that the description of the location of the land is ambiguous. There is nothing in these agreements to show that the land described as "kebun … di belakang rumah adik saya Saie Bin Kontoi" referred to in exh. HRB 1 and "kebunnya" mentioned in exh. HRB-2 refer to the land in question. It is therefore highly questionable whether the land mentioned in exh. HRB-1 and exh. HRB-2 is actually the land in question. I say so for the following reason.

[26] Exhibit HRB-1 was executed on 16 October 1951 whereas exh. HRB-2 was executed on 15 September 1956. However, based on the certified document of title ie, exh. E-3 annexed to the plaintiffs' affidavit in reply, the plaintiffs' late father was already the registered proprietor of the land since 1941. It states:

This Certificate issued on 10.10. o'clock a.m. on the 18th day of November, 974 in terms of section 117(2) of the Land Code, shows that the person hereinafter named is the registered proprietor as at the said date of the land described herein subject to such charges, limitations and other interests as are shown hereon.

Sedilu-Gedong Land District Survey Plan …

Nature, number and term of Title: Lot 44, Block 20, Ninety-ninety (99) years.

Date of Issue: 31st January, 1941

[27] The plaintiffs contended that neither the plaintiffs nor their late father had ever permitted or consented to the defendant occupying the land.

[28] The defendant has not adduced any cogent evidence to show that their entry onto the land was with the consent, permission or agreement of the plaintiffs or their late father.

[29] In *Lee Beng Lai & Ors v. Tetuan Tokoyaki Property Sdn Bhd* [2002] 3 CLJ 365 CA, the appellants claimed that they were given permission to occupy the land by the state authority under the new village scheme subject to payment of premium, quit rent and survey. They had also claimed a right in equity to occupy the land. The Court of Appeal in dismissing the appeal held:

> In order to oppose this summary procedure, this court is of the view that the 1st defendant ought to have at least adduced evidence and or produced a letter from the state authority or the plaintiff's predecessors in title to show that the 1st defendant's initial entry and his continued occupation of the said lot was with the consent, permission or agreement of the state authority or the plaintiff's predecessor in title. As the 1st Defendant had failed to show or prove any of the above requirements, the plaintiffs are entitled to summary eviction.

Fraudulent Transfer

[30] The defendant averred that the late father of the plaintiffs had in 1974 acquired the title of the land ie, exh. E-3 through fraudulent transfer. However, the defendant did not adduce any cogent evidence in the affidavit to substantiate this serious allegation of fraud. Consequentially this bare assertion of fraudulent transfer carries no probative value and should not be regarded.

Adverse Possession

[31] The defendant averred that her late grandfather and her late parents have occupied the land since 1950's and she has lived on the land since her birth.

[32] One might ask whether the defendant could have derived legitimate interest on the land by reason of occupation on the land for a period of time.

[33] It is opportune to refer to s. 131 of the Sarawak Land Code (Cap. 81) which states:

> Title guaranteed to registered proprietor
>
> 131. No title or right to land included in the Register shall be acquired by possession or user adversely to, or in derogation of, the title of the registered proprietor holding directly from the Government.

[34] This section was addressed in the case of *Jamir Hassan Najir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773; [1992] 2 MLJ 46 HC. In that case the plaintiff commenced an action by writ of summons seeking a declaration, *inter alia*, that he was entitled to be registered as the proprietor of a certain land. The plaintiff lodged a caveat in respect of the land and claimed adverse possession on the ground that the right of the registered proprietor had extinguished by virtue of s. 26 of the Limitation Ordinance (Cap. 49) of Sarawak read with item 112 of the schedule to the Ordinance. The defendant was the executrix of the estate of the registered proprietor. The defendant applied

for an order under O. 18 r. 19 of the Rules of the High Court 1980 that the writ of summons and statement of claim be struck out on the grounds that the statement of claim disclosed no reasonable cause of action, was frivolous and vexatious and was otherwise an abuse of the process of the court.

[35] Justice Haidar (as he then was) in allowing the defendant's application, held, *inter alia*:

> (2) The exclusion of the application of the doctrine of adverse possession in the Torrens system is based on the notion that such doctrine would conflict with the fundamental principle of the Torrens system – the indefeasible register. The basic object of the Torrens system, it would appear, is to facilitate proof of ownership by certifying title in a written instrument and therefore the principle of allowing ownership to be proved by evidence of physical occupation should be rejected.
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> (3) Section 131 of the Land Code of Sarawak protects the "title" or the "right" of the registered proprietor; it prevents both the acquisition of a title by adverse possession or user to or in derogation of the title of the registered proprietor holding directly from the government.

[36] In *Yayasan Pelajaran Bahagian Pertama Sarawak v. Lim Teck Hai and Ors* [2008] 1 LNS 637, Justice David Wong Dak Wah (now JCA) held:

> … I agree with the view expressed by the learned authors in Land Law (Butterworth) at p. 7 that s. 131 of the Land Code is in the same position as s. 341 of the National Land Code 1965 in that there can be no adverse possession against the registered proprietor of land or any person entitled to a registered interest therein for any period whatsoever … Our s. 131 protects the "title" or "the right" of the registered proprietor; it prevents both the acquisition of a title by adverse possession or user to or in derogation of the title of the registered proprietor holding directly from the Government.

[37] Section 341 of the National Land Code states:

> Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the proprietor or any person or body entitled to an interest therein, and accordingly, the Limitation Ordinance, 1953, shall in no circumstance operate to extinguish any title to, or interest in, land.

[38] In *Immetec Sendirian Berhad v. Yong Tai Hoong & Anor* [1994] 1 LNS 60; [1995] 1 MLJ 390, the plaintiff was the registered owner of a land upon which was constructed a block of flats. The defendants were squatters residing in wooden houses on the plaintiff's land. The negotiations for settlement between the plaintiff and the

defendants failed; thereupon the plaintiff served notices on the defendants to quit. The defendants refused to vacate the land. The plaintiff took out an application under O. 89 of the Rules of the High Court 1980 to obtain vacant possession. The defendants argued, amongst others, that the defendants and their families have been staying and occupying the premises for the last 40 years with the permission and or consent or full knowledge of the previous owner. The court held:

> The fact that the defendants had been staying and occupying the premises for the last 40 years did not affect the title of the plaintiff as the registered owner because the defendants cannot claim adverse possession.

[39] It is pertinent to point out that the Land Code of Sarawak (Cap. 27) in giving effect to the indefeasible title did not recognise the squatters. Section 30(1) of the Land Code (Cap 27) states:

> No one whether a native or otherwise may, without documentary title, acquire a title to land by squatting on it or on any part thereof or exercising acts of ownership over it, and anyone so doing may be required to vacate the land without payment of any compensation, even though he may have squatted on the land or exercised acts of ownership over it for twelve years and upward.

[40] It is vividly clear from the provisions in the Land Code of Sarawak (Cap 27 as well as Cap 80) and the authorities above that regardless of how long the defendant and her family have stayed on the land, it makes no difference as they cannot claim adverse possession against the plaintiffs who are the registered proprietresses of the land.

Conclusion

[41] For all the reasons stated above, it is my finding that the defendant has not shown to the court's satisfaction that there is a triable issue of law or fact that warrant the dismissal of the plaintiffs' application. Accordingly, I hold that the plaintiffs are entitled to summary eviction and order in terms as prayed for in the originating summons with costs of RM3,000.